STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 10, 2014
v	No. 309236 Oakland Circuit Court
LEONARD RICHARD WHITE, Defendant-Appellant.	Family Division LC No. 2011-785216-DJ

Before: DONOFRIO, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of voluntary manslaughter, MCL 750.321. We affirm.

On June 4, 2011, 15-year-old defendant and the victim, Johnathan Rickman, became involved in a verbal dispute in the kitchen of the home of a mutual friend. Rickman allegedly assaulted defendant, punching him multiple times in the head. Defendant did not initially fight back. However, after Rickman stopped, defendant picked up a knife from a butcher block. Another young man, Ronald Foster, physically restrained defendant. However, while holding the knife, defendant told Foster to let him go and he did. Defendant then chased Rickman through the front door of the home, and the two eventually came together across the street in front of Rickman's parked vehicle. Defendant swung the knife at Rickman, stabbing him once. Foster drove Rickman to a nearby hospital, but Rickman died. The knife had punctured his heart.

Defendant was subsequently arrested and the prosecutor filed a petition that included a count of open murder, MCL 750.316, as well as felonious assault, MCL 750.82. Pursuant to MCL 712A.2d(1), the prosecutor designated that defendant was to be tried as an adult. Following a three-day probable cause hearing, defendant was bound over as charged. After a five-day trial, a jury found defendant guilty of voluntary manslaughter, but not guilty of felonious assault. The trial court determined that an adult sentence was appropriate and sentenced defendant to 4 to 15 years' imprisonment. Defendant now appeals as of right.

First, defendant argues that the trial court abused its discretion by sentencing him as an adult. We disagree.

"[W]hen reviewing a trial court's decision to sentence a minor as a juvenile or as an adult . . . . the appellate court first reviews the trial court's findings of fact for clear error and then reviews the ultimate decision for an abuse of discretion." *People v McSwain*, 259 Mich App 654, 681-682; 676 NW2d 236 (2003); see also *People v Thenghkam*, 240 Mich App 29, 41-42; 610 NW2d 571 (2000), overruled in part on other grounds *People v Petty*, 469 Mich 108 (2003). "[A] trial court's findings of fact are clearly erroneous if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *McSwain*, 259 Mich App at 682. "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *People v Buie*, 491 Mich 294, 320; 817 NW2d 33 (2012).

"Following a judgment of conviction in a designated case, [MCL 712A.18(1)(m)][1] provides a judge with the option of imposing either a juvenile disposition, an adult sentence, or a blended sentence, i.e., a delayed sentence pending defendant's performance under the terms provided by a juvenile disposition." *Petty*, 469 Mich at 113 (footnote added). MCL 712A.18(1)(m) provides, in part:

> In determining whether to enter an order of disposition or impose a sentence under this subdivision, the court shall consider all of the following factors, giving greater weight to the seriousness of the offense and the juvenile's prior record:
>
> (*i*) The seriousness of the offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim.
>
> (*ii*) The juvenile's culpability in committing the offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines.
>
> (*iii*) The juvenile's prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior.
>
> (*iv*) The juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming.
>
> (*v*) The adequacy of the punishment or programming available in the juvenile justice system.

[1] At the time *Petty* was decided, the relevant statutory language was found at MCL 712A.18(1)(n). See *Petty*, 469 Mich at 113. However, our Legislature amended MCL 712A.18 by way of 71 PA 2003, moving the language previously found in subsection (1)(n) to subsection (1)(m).

(*vi*) The dispositional options available for the juvenile.

The trial court must "deliberately consider whether to enter an order of disposition, impose a delayed sentence, or impose an adult sentence in light of the six factors enumerated . . . ." *Petty*, 469 Mich at 117. "As evidence that it complied with the statute, the trial court, on the record, must acknowledge its discretion to choose among the three alternatives." *Id*. However, "[a] trial court need not engage in a lengthy 'laundry list' recitation of the factors. Rather, the focus of the hearing should be on the three options, i.e., an adult sentence, a blended sentence, or a juvenile disposition . . . ." *Id*.

> As a result, trial courts will no longer be forced to undertake a mechanical recitation of the statutory criteria. Rather, a court must logically articulate on the record why it has chosen one alternative over the other two, in light of the criteria articulated in [MCL 712A.18(1)(m)]. By so doing, a court performs the analysis required by the Legislature, while establishing an adequate record to permit appellate review. [*Id*. at 117-118.]

A review of the dispositional hearing shows that the trial court fully complied with the requirements as set forth by our Supreme Court in *Petty*. Although it was not required to "engage in a lengthy 'laundry list' recitation of the factors[,]" *Petty*, 469 Mich at 117, the trial court discussed and analyzed each factor set forth in MCL 712A.18(1)(m). The trial court noted that: (1) defendant's crime was "the most serious offense, the killing of a person and devastation for the victim's family;" (2) defendant was "the sole participant and [defendant] said [he was] scared and [] felt the victim would hurt [him];" (3) defendant had no prior history of delinquency; (4) defendant had done well at Children's Village, where he had been placed since being taken into custody; (5) "programming for a youthful offender is stronger in the juvenile system. Punishment and programming is less restrictive in the juvenile system[,] [defendant] would not be in contact with more experienced criminals[,]" and the "maximum sentence as a juvenile would be about four years;" and (6) the court could "order a juvenile disposition, impose an adult sentence, or delay imposition of an adult sentence, sometimes called a blended sentence . . . ."

After this discussion, the court found "by a preponderance of the evidence that the best interests of the public are not served by sentencing [defendant] as a juvenile." The trial court noted that defendant did not "seem to recognize that other options were available to [him] such as leaving the premises, calling 911, or locking the door to prevent the victim from returning. [Defendant's] poor impulse control and overreaction to the situation places the public at risk." The trial court specifically discussed the likely result of a blended sentence and the likely result of an adult sentence, including the specific facilities where defendant would be placed. After providing this explanation for its decision, the trial court concluded by stating "that the nature of the offense, a killing, an impact on the victim, both the deceased and his family, public safety and deterrents weigh heavily on a prison term and that programming for youth is available in the prison setting."

As this record demonstrates, the trial court deliberately considered, at great length, the three dispositional options available, taking into consideration each factor provided by MCL 712A.18(1)(m). Although defendant argues that the trial court placed too much weight on the

seriousness of defendant's offense, MCL 712A.18(1)(m) requires the trial court to "giv[e] greater weight to the seriousness of the offense . . . ." Defendant also argues that the trial court did not adequately consider his culpability for the crime, in light of his age. However, the record demonstrates that the trial court did consider defendant's culpability, noting that defendant may have feared Rickman, but also reminded defendant that he had other options available to him that likely would have avoided Rickman's death altogether. Defendant also argues that the trial court did not adequately consider his ability to be rehabilitated. However, many of the factors enumerated by MCL 712A.18(1)(m) are aimed at determining a juvenile's ability to be rehabilitated. The record demonstrates that the trial court analyzed each of these factors. Although defendant disagrees with the result reached by the trial court, the trial court did not abuse its discretion in finding that an adult sentence was appropriate.

Defendant's other arguments challenging his sentencing are without merit. In brief, defendant argues that the trial court did not "establish a proper record" before making its determination but, as discussed, the trial court made an extensive record, engaging in a thorough discussion of its decision, in full compliance with the mandates of *Petty*, 469 Mich at 117-118. Defendant also argues that the trial court erred by not allowing him the opportunity to examine the authors of the reports on which the trial court relied, but those persons were present at the hearing, defendant did not seek to question them, and there is no indication that the trial court prevented defendant from examining them. Relying on *People v Schumacher*, 75 Mich App 505, 514; 256 NW2d 39 (1977), defendant further argues that his counsel should have insisted that evidence be taken on the record regarding the programs available in the juvenile and adult corrections systems. However, the holding in *Schumacher* is limited by its own terms to hearings regarding the decision to waive jurisdiction over a juvenile from the probate court to the criminal court. *Id*. at 506-507, 514. Here, because the prosecutor designated the case to be tried as an adult criminal proceeding, no such waiver hearing was required. See MCL 712A.2d(1) and (2).

And finally defendant argues that reversal or resentencing is required because the trial court conducted ex parte communications with those who prepared the presentence reports. The trial court specifically stated that it conducted meetings with those who had prepared these reports. It is true that, where a judge acquires additional information regarding the defendant that is not included in a written presentence report, resentencing is required. *People v Smith*, 423 Mich 427, 459; 378 NW2d 384 (1985). However, defendant only alleges that ex parte conversations occurred. In *Smith*, our Supreme Court specifically refused to create a rule that would "presume prejudice per se from the fact of communication" between sentencing judges and those preparing presentence reports, *id*., citing the need for "healthy, general discourse . . . [,]" *id*. at 458. Defendant has not presented any evidence that the trial court received any information beyond that which was provided in the written reports. On the whole, defendant's arguments lack merit.

Next, defendant argues that the trial court abused its discretion by allowing the medical examiner responsible for Rickman's autopsy, Dr. Bernardino Pacris, to testify regarding Rickman's toxicology report. The essence of defendant's argument is that only the toxicologist, not Pacris, should have been able to testify regarding the contents of the toxicology report. After review of this preserved issue for an abuse of discretion, we disagree. See *People v Fomby*, 300 Mich App 46, 48; 831 NW2d 887 (2013).

MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Here, Pacris testified that: his field of expertise included investigations into drug-related deaths, he had researched the effects of marijuana on a person, and he had consulted with the toxicologist who prepared the report. This testimony demonstrates that Pacris had the required knowledge to interpret Rickman's toxicology report. Accordingly, the trial court did not abuse its discretion in allowing Pacris to testify regarding the quantity of marijuana present in Rickman's body and the potential effect of that amount of marijuana.

But even if the trial court erred in admitting this contested testimony, any potential error was harmless. An error in the admission of evidence is not grounds for reversal unless that error was prejudicial. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The testimony of multiple eyewitnesses, including defendant, made it clear that defendant, Rickman, and others all smoked marijuana. Regarding the effect of Rickman's marijuana use, Pacris only testified that "people . . . react differently to certain drugs . . . . [T]his is a pretty small amount of marijuana." Thus, Pacris' testimony indicated that Rickman had smoked a small amount of marijuana, a fact that was substantiated by eyewitness testimony. Pacris did not, in the end, provide an opinion on what effect this would have had on Rickman. Although defendant asserts that this evidence was prejudicial to his case, he does not explain how or why this is true. Rather, as defendant states in his brief, Pacris' testimony regarding Rickman's use of marijuana was "completely irrelevant to [defendant's] guilt or innocence." Because admission of this testimony was not outcome-determinative, any potential error was harmless. See *id*.

Next, defendant argues that the trial court erred when it denied his motion to quash the felonious assault charge. We disagree.

> This Court reviews for an abuse of discretion both a district court's decision to bind a defendant over for trial and a trial court's decision on a motion to quash an information. An abuse of discretion occurs when the outcome falls outside the range of reasonable and principled outcomes. This Court reviews de novo a trial court's interpretation of the law related to its decision on a motion to quash the information. [*People v Waterstone*, 296 Mich App 121, 152-153; 818 NW2d 432 (2012) (quotation marks and citations omitted).]

Defendant's claim of error is moot. "An issue is moot if an event has occurred that renders it impossible for the court, if it should decide in favor of the party, to grant relief." *People v Billings*, 283 Mich App 538, 548; 770 NW2d 893 (2009). Because the jury acquitted defendant of felonious assault, defendant's rights were not affected by the trial court's decision regarding his motion to quash. Thus, there is no relief that could be granted by this Court in

regard to the felonious assault charge, and the issue is moot. See *People v Blackburn*, 135 Mich App 509, 521; 354 NW2d 807 (1984). Nevertheless, if we did consider the issue, we would conclude that the trial court did not abuse its discretion when it bound defendant over on the charge of felonious assault. See *People v Yost*, 468 Mich 122, 125; 659 NW2d 604 (2003); *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Next, defendant argues that his trial counsel was ineffective for failing to investigate defendant's Facebook account, and for failing to ensure that defendant received a proper dispositional hearing. We disagree.

"A claim of ineffective assistance of counsel presents a mixed question of law and fact. This Court reviews a trial court's findings of fact, if any, for clear error, and reviews de novo the ultimate constitutional issue arising from an ineffective assistance of counsel claim." *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531 (2011) (citations omitted). However, to preserve a claim of ineffective assistance of counsel, a defendant must move for a new trial or for a *Ginther*[2] hearing in the trial court. *People v Sabin (on Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000); *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991). "Failure to move for a new trial or for a *Ginther* hearing ordinarily precludes review of the issue unless the appellate record contains sufficient detail to support the defendant's claim." *Sabin*, 242 Mich App at 658-659. Defendant did not move for a new trial or for a *Ginther* hearing in the trial court; thus, the issue is unpreserved, and review is limited to the appellate record. *Id*.

To establish ineffective assistance of counsel, a defendant must show that the attorney's "performance fell below an objective standard of reasonableness[] . . . and that, but for counsel's deficient performance, a different result would have been reasonably probable." *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). "A defendant pressing an ineffective assistance claim must overcome a strong presumption that counsel's tactics constituted sound trial strategy." *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). It is the defendant who bears "the burden of establishing the factual predicate for his claim of ineffective assistance of counsel[.]" *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant first argues that counsel was ineffective because he failed to investigate defendant's Facebook account. "'[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004) (citation omitted). At trial, counsel stated that he "didn't have any knowledge of this Facebook information whatsoever." However, it is apparent that trial counsel was aware that Facebook accounts might provide relevant information. At the probable cause hearing, counsel questioned one eyewitness regarding whether he was familiar with Facebook, and whether Rickman or Foster were his friends on Facebook. But because

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

defendant did not move for a new trial or for a *Ginther* hearing, no record has been developed that would explain why trial counsel did not investigate defendant's Facebook account.[3] There is no record upon which this Court may determine whether trial counsel's apparent failure to investigate defendant's Facebook account amounted to a "reasonable professional judgment[] support[ing] the limitations on investigation." *Grant*, 470 Mich at 485. Thus, defendant cannot meet his burden to demonstrate that his trial counsel's strategic choices regarding his investigation were unsound, or that his performance was objectively unreasonable. Accordingly, defendant is not entitled to relief. See *Armstrong*, 490 Mich at 289-290.

Defendant next argues that his trial counsel was ineffective for failing to "ensure a proper dispositional hearing . . . ." Defendant first points to trial counsel's failure to examine the authors of the reports that were used by the trial court to determine defendant's sentence. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Defendant has presented no reason to believe that this strategy was unsound. Further, defendant does not indicate what, if any, information might have been procured through such an examination. As such, defendant cannot show that a different result likely would have ensued had trial counsel sought to examine these authors; thus, he has not established that he was denied the effective assistance of counsel in this regard. See *Armstrong*, 490 Mich at 289-290.

Finally, defendant takes issue with his trial counsel's failure to insist that a factual record be developed regarding the programs available to defendant in the juvenile and adult corrective systems. However, once again, defendant fails to identify what information might have been brought out through such factual development and, thus, has not established that a different result was likely. Moreover, as discussed above, the authority relied upon by defendant in arguing that such factual development was required, *Schumacher*, is not applicable here. In summary, defendant has not established that he was denied the effective assistance of counsel. See *Armstrong*, 490 Mich at 289-290.

Affirmed.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen

[3] As an example of a possible explanation, counsel indicated that the Facebook evidence was new to him because he "[did not] believe [defendant] could even access his Facebook account from—from the jail . . . ."